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Bank Pertanian (M) Bhd v Koperasi Permodalan Melayu Negeri Johor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1605–07 OF 2012
ABDUL MALIK ISHAK, AZIAH ALI AND MOHTARUDIN BAKI JJCA
3 JUNE 2014

Banking — Banks and banking business — Loan agreement — Breach — Obligation to exhaust all legal remedies before resorting to liquidating fixed deposits — Premature liquidation of fixed deposits amounting to breach of contract

Banking — Security for advances — Third party memorandum of deposit — Validity, of — Whether third party memorandum of deposit granted by co-operative society void due to prohibition in s 51(1) of the Co-Operative Societies Act 1993

Contract — Agreement — Facility agreement — Breach — Obligation to exhaust all legal remedies before resorting to liquidating fixed deposits — Premature liquidation of fixed deposits amounting to breach of contract

Unincorporated Associations — Societies — Co-operative society — Powers, of — Validity of acts done by co-operative society to be determined by provisions of Co-Operative Societies Act 1993 and not by provisions of by laws — Whether by laws of statutory corporation which conflict with provisions of governing statute are ultra vires and invalid — Whether third party memorandum of deposit granted by co-operative society void due to prohibition in s 51(1) of the Co-Operative Societies Act 1993

The respondent/plaintiff had entered into a joint venture agreement with one 'Estate & Forestry Consulting Management Sdn Bhd' ('the borrower') to develop an oil palm plantation. By a facility agreement ('the facility agreement'), the appellant/defendant granted a term loan facility of RM25m to the borrower ('the facility'). As one of the securities to the facility, the respondent executed a third party memorandum of deposit for the sum of RM25m ('the MOD') in favour of the appellant. Pursuant to the MOD, the respondent deposited a sum of RM13m in the form of fixed deposit ('FD') with the appellant. The borrower defaulted in its repayment obligations under the facility agreement. Thereafter, the appellant commenced proceedings and obtained judgment in default against the borrower. On 6 December 2007 the

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appellant unilaterally uplifted the FD and utilised the same towards the indebtedness of the borrower. The respondent commenced the present suit for a declaration, inter alia, that the MOD was null and void for being in contravention of the Co-Operative Societies Act 1993 ('the Act'), or alternatively, if the MOD was valid, for breach of cl 4 of the MOD by the appellant prematurely liquidating the FD. The respondent claimed for return of the monies deposited and the appellant counter claimed for the balance monies of RM12m that the respondent had agreed to pledge to the appellant pursuant to the MOD. At the High Court two issues were raised for determination ie the validity of the MOD and breach of contract. Vide cl 4 of the MOD, the appellant agreed that in the event the borrower failed to repay the facility to the appellant, the appellant was at liberty to withdraw the deposit and to apply the proceeds thereof towards discharge of any amount due to the appellant. However this was subject to the proviso that the appellant must have exhausted all available legal actions against the borrower or other security party to recover the amount due. The learned judicial commissioner ('the JC') found that since the respondent was a society registered under the Act, the validity of the MOD had to be determined by reference to the Act or rules made thereunder and not by reference to the respondent's by laws. The JC found that there was no provision in the Act which authorised the respondent to issue the guarantee to the appellant by way of the MOD. The JC further found that the guarantee issued by the respondent to a non-member for the benefit of a non-member was against the object provision of the Act. Hence, the MOD was held to be null and void ab initio and of no effect for being in contravention of s 4 of the Act. Based on the appellant's concession that there were still legal remedies which had yet to be taken against the borrower, the guarantor and other security parties, the JC held that the appellant's act of uplifting the FD of the respondent was a violation of cl 4 of the MOD which amounted to a breach of contract. The JC thus allowed the respondent's claim and dismissed the appellant's counterclaim. Hence this appeal.

Held, dismissing the appeal with costs:

(1) A statutory corporation can only do what is expressly authorised by the Act under which it is incorporated. The issue of the validity of the MOD had to be determined by reference to the provisions in the Act and not by reference to the respondent's by laws since by laws are rules of conduct which govern the internal government of the respondent; *Malaysia Shipyard & Engineering Sdn Bhd v Bank Kerjasama Rakyat (M) Bhd* [1985] 2 MLJ 359followed (see paras 30–32).

(2) Section 51(1) of the Act expressly prohibits a co-operative society from granting any Islamic financing or giving credit facility except to the category of persons mentioned therein. The prohibition in s 51(1) is statutory in nature. The respondent did not come within the class of co-operative society under s 51(2) that had been 'permitted' to grant any

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Islamic financing or give credit facility to persons other than those specified in s 51(1) (see paras 34, 36 & 38).

(3) The by laws of any statutory corporation can only provide for matters that are permissible under the Act and any by law which purports to allow what is prohibited by the Act, or are inconsistent with the provisions of the Act will, to that extent, be invalid for being ultra vires the Act. Accordingly, no co-operative society can, by way of its by laws, confer upon itself any power to enter into any transaction that has been expressly prohibited by the principal Act (see para 39).

(4) It was clear that under cl 4, the appellant was contractually obliged to exhaust all the legal remedies available to it to recover the amount due and owing by the borrower and other security parties before resorting to liquidating the FD. The appellant had conceded that it had not done so before liquidating the FD. In the circumstances, the appellant's act was premature and amounted to a breach of contract (see para 47).

[Bahasa Malaysia summary

Responden/plaintif telah memeterai satu perjanjian usaha sama dengan 'Estate & Forestry Consulting Management Sdn Bhd' ('peminjam') untuk membangunkan ladang kelapa sawit. Melalui satu perjanjian kemudahan ('perjanjian kemudahan'), perayu/defendan memberikan satu kemudahan pinjaman berjangka sebanyak RM25 juta kepada peminjam ('kemudahan'). Sebagai satu daripada cagaran kepada kemudahan, responden memeterai satu memorandum deposit pihak ketiga bagi jumlah wang sebanyak RM25 juta ('MD') bagi pihak perayu. Menurut MD, responden mendepositkan sejumlah RM13 juta dalam bentuk deposit tetap ('DT') dengan perayu. Peminjam ingkar dalam kewajipannya dalam pembayaran balik di bawah perjanjian kemudahan. Seterusnya, perayu memulakan prosiding-prosiding dan mendapatkan penghakiman ingkar terhadap peminjam. Pada 6 Disember 2007 perayu secara unilateral mengeluarkan DT dan menggunakan DT tersebut terhadap hutang peminjam. Responden memulakan guaman ini untuk satu deklarasi, antara lainnya, bahawa MD adalah tidak sah dan terbatal disebabkan bercanggah dengan Akta Pertubuhan Koperasi 1993 ('Akta'), atau secara alternatifnya, sekiranya MD adalah sah, untuk pelanggaran klausa 4 MD oleh perayu telah secara pramatang melikuidasikan DT. Responden menuntut untuk pemulangan wang yang dideposit dan perayu menuntut balas untuk baki wang sebanyak RM12 juta yang dipersetujui oleh responden untuk disandarkan kepada perayu menurut kepada MD. Di Mahkamah Tinggi kedua-dua isu dikemukakan untuk ditentukan iaitu kesahan MD dan pelanggaran kontrak. Menerusi klausa 4 MD, perayu bersetuju bahawa sekiranya peminjam gagal untuk membayar semula kemudahan kepada perayu, perayu bebas untuk mengeluarkan deposit dan untuk menggunakan hasil daripadanya untuk menolak sebarang jumlah yang kena dibayar kepada perayu. Walau bagaimanapun, ini adalah tertakluk kepada syarat bahawa

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perayu mesti telah menggunakan kesemua tindakan undang-undang yang tersedia terhadap peminjam atau pihak pencagar yang lain untuk mendapat semula jumlah yang terhutang. Pesuruhjaya kehakiman yang bijaksana ('PK') mendapati bahawa memandangkan responden merupakan pertubuhan yang berdaftar di bawah Akta, kesahan MD perlu ditentukan dengan merujuk kepada Akta atau peraturan yang dibuat di bawahnya dan bukannya merujuk kepada undang-undang kecil responden. PK mendapati bahawa tiada peruntukan di dalam Akta yang memberi kuasa kepada responden untuk mengeluarkan jaminan kepada perayu melalui MD. PK seterusnya mendapati bahawa jaminan yang dikeluarkan oleh responden kepada bukan ahli untuk manfaat seorang bukan ahli adalah bercanggah dengan tujuan peruntukan Akta. Oleh itu, MD diputuskan sebagai tidak sah dan terbatal dan tidak berkesan kerana bercanggah dengan s 4 Akta. Menurut konsesi perayu bahawa masih terdapat remedi undang-undang yang belum lagi digunakan terhadap peminjam, penjamin dan pihak pencagar yang lain, PK memutuskan bahawa tindakan perayu mengambil DT responden merupakan pelanggaran klausa 4 MD yang merupakan satu pelanggaran kontrak. Oleh itu PK membenarkan tuntutan responden dan menolak tuntutan balas perayu. Oleh itu rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Pertubuhan berkanun hanya boleh melakukan apa yang secara tersurat dibenarkan oleh Akta di mana pertubuhan ditubuhkan. Isu kesahan MD perlu ditentukan dengan merujuk kepada peruntukan-peruntukan dalam Akta dan bukannya merujuk kepada undang-undang kecil responden memandangkan undang-undang kecil adalah peraturan kelakuan yang mentadbir pengurusan dalaman responden; *Malaysia Shipyard & Engineering Sdn Bhd v Bank Kerjasama Rakyat (M) Bhd* [1985] 2 MLJ 359 diikuti (lihat perenggan 30–32).

(2) Seksyen 51(1) Akta secara tersurat melarang pertubuhan koperasi daripada memberikan apa-apa pembiayaan Islamik atau memberikan kemudahan kredit kecuali kepada kategori orang yang dinyatakan di sini. Larangan dalam s 51(1) adalah bersifat statutori. Responden tidak termasuk dalam kelompok pertubuhan koperasi di bawah s 51(2) yang telah 'dibenarkan' untuk memberikan apa-apa pembiayaan Islamik atau memberikan kemudahan kredit kepada orang selain daripada yang dinyatakan dalam s 51(1) (lihat perenggan 34, 36 & 38).

(3) Undang-undang kecil mana-mana badanan berkanun hanya boleh memperuntukkan untuk perkara-perkara yang dibenarkan di bawah Akta dan apa-apa undang-undang kecil yang bertujuan untuk membenarkan apa yang dihalang oleh Akta, atau tidak konsisten dengan peruntukan Akta yang akan, pada suatu tahap, tidak sah kerana bercanggah dengan Akta. Sehubungan dengan itu, tiada pertubuhan koperasi yang boleh, melalui undang-undang kecilnya, memberikan

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kuasa kepada dirinya untuk membuat apa-apa transaksi yang secara tertulis dilarang oleh Akta utama (lihat perenggan 39).

(4) Adalah jelas bahawa di bawah klausa 4, perayu secara kontraktual berkewajipan untuk menggunakan semua remedi undang-undang yang tersedia untuk mendapatkan semula jumlah yang kena dibayar dan terhutang oleh peminjam dan pihak pencagar yang lain sebelum bertindak untuk melikuidasikan ST. Perayu mengakui bahawa perkara tersebut tidak dilakukan sebelum melikuidasikan ST. Dalam keadaan tersebut, tindakan perayu adalah pramatang dan merupakan pelanggaran kontrak (lihat perenggan 47).]

Notes

For cases on co-operative society, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3229–3248.

For cases on facility agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2972–2977.

For cases on loan agreement, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2617–2627.

Cases referred to

Chase Manhattan Bank NA v Mercantile Co-operative Thrift & Loan Society Ltd [1992] 2 MLJ 168, SC (refd)

Malaysia Shipyard & Engineering Sdn Bhd v Bank Kerjasama Rakyat (M) Bhd [1985] 2 MLJ 359, SC (folld)

Legislation referred to

Bank Pertanian Malaysia Berhad Act 2008 s 4(1)

Co-Operative Societies Act 1993 ss 2, 4, 17A(1), 51(1), (2), 52, 53, 53(1), 87

Companies Act 1965

Appeal from: Civil Appeal No 22–225 of 2008 (High Court, Johor Bahru)

Kumar Kanagasingam (Mak Hon Pan with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.

Ng Chew Hor (Kuna Nadasen with him) (Baharudin, Wan & Kuna) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant (the defendant in the court below) is a company under the Companies Act 1965 which was incorporated under the name 'Bank Pertanian Malaysia Berhad'. By virtue of s 4(1) of the Bank Pertanian Malaysia Berhad Act 2008, all property, rights and liabilities of the former Bank Pertanian

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Malaysia were transferred and vested in the appellant.

[2] The respondent (the plaintiff in the court below) is a body corporate registered under the Co-Operative Societies Act 1993 ('the Act').

[3] This is an appeal against the decision of the High Court which allowed the claim by the respondent for, inter alia, a declaration that a third party memorandum of deposit dated 22 March 2002 for the sum of RM25m ('the MOD') given by the respondent in favour of the appellant is invalid and unenforceable.

[4] We have considered the appeal records and the submissions made by both parties. We were unanimous in our decision that this appeal be dismissed and we affirmed the decision of the High Court. We awarded costs of RM50,000 here and below with the deposit to be paid to the respondent. We now give our reasons below.

BRIEF FACTS

[5] The respondent had entered into a joint venture agreement known as the 'Oil Palm Development and Plantation Agreement' dated 12 November 2001 ('the agreement') with one 'Estate & Forestry Consulting Management Sdn Bhd' ('the borrower'), to develop an oil palm plantation on three pieces of land owned by the respondent ('the project') through a wholly owned company called 'Teroka Pertiwi Sdn Bhd'.

[6] By a facility agreement dated 22 March 2002 ('the facility agreement'), the appellant granted a term loan facility of RM25m to the borrower ('the facility').

[7] As one of the securities to the facility, the respondent executed the MOD in favour of the appellant. Pursuant to the MOD, the respondent deposited a sum of RM13m in the form of fixed deposit ('FD') with the appellant. The borrower had also issued debentures over all its assets in favour of the appellant.

[8] The borrower defaulted in its repayment obligations under the facility agreement. Thereafter, the appellant commenced proceedings and obtained judgment in default against the borrower.

[9] On 6 December 2007 the appellant unilaterally uplifted the FD and utilised the same towards the indebtedness of the borrower.

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[10] The respondent commenced the present suit for a declaration, inter alia, that the MOD is null and void for being in contravention of the Act, or alternatively, if the MOD was valid, for breach of cl 4 of the MOD by the appellant prematurely liquidating the FD. Therefore the respondent claims for return of the monies deposited together with interests amounting to RM15,070,504.09.

[11] The appellant counterclaimed for the balance monies of RM12m that the respondent had agreed to pledge to the appellant pursuant to the MOD together with interests at 8%pa until full payment.

DECISION OF THE HIGH COURT

[12] At the High Court two issues were raised for determination ie the validity of the MOD and breach of contract.

Validity of the MOD

[13] The learned judicial commissioner ('JC') found that since the respondent is a society registered under the Act, the validity of the MOD has to be determined by reference to the Act or rules made thereunder and not by reference to the respondent's by laws. Relying on the authorities of *Malaysia Shipyard & Engineering Sdn Bhd v Bank Kerjasama Rakyat (M) Bhd* [1985] 2 MLJ 359 and *Chase Manhattan Bank NA v Mercantile Co-operative Thrift & Loan Society Ltd* [1992] 2 MLJ 168, His Lordship agreed with the respondent that based on the principles enunciated in the abovementioned authorities, there is no provision in the Act which authorises the respondent to issue the guarantee to the appellant by way of the MOD. According to His Lordship, there must be an express provision authorising the respondent to give such guarantee in order for the giving of the said security to be valid in law. His Lordship opined that the power to bind the respondent to a contract of guarantee must be properly sanctioned by statute for the contract to be enforceable.

[14] Further and with reference to the two authorities, His Lordship referred to s 4 of the Act ('the object provision') which states as follows:

> Societies which may be registered
>
> 4(1) A society which consists of individual persons only and which has as its object the promotion of the economic interest of its members in accordance with co-operative principles may be registered under this Act as a primary society.
>
> (2) A society which consists of primary societies only and which has as its object the facilitation of the operations of such societies may be registered under this Act as a secondary society.

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> (3) A society which consists of secondary societies only or of secondary and primary societies and which has as its object the facilitation of the operations of such societies may be registered under this Act as a tertiary society.

[15] His Lordship noted that according to s 4, the object of a co-operative society should be the promotion of the economic interests of its members. Neither the appellant nor the borrower are members of the respondent. His Lordship found that the guarantee issued by the respondent to a non-member for the benefit of a non-member was against the object provision of the Act. Accordingly His Lordship held that the MOD issued by the respondent is null and void ab initio and of no effect for being in contravention of s 4 of the Act.

BREACH OF THE CONTRACT

[16] The respondent had further submitted in the alternative that, if the MOD was valid, the appellant had breached cl 4 of the MOD, which was also incorporated as cl 13.2 in the facility agreement.

[17] Clause 4 of the MOD states, inter alia, that the appellant agrees that, in the event the borrower fails to repay the facility due and owing to the appellant, the appellant was at liberty to withdraw the deposit or such other sum(s) as may be from time to time substituted for or replacing the said deposit and to apply the proceeds thereof in or towards the discharge of any amount due to the appellant. However this is subject to the proviso that the appellant has exhausted all available legal actions or proceedings against the borrower or other security party(s) to recover the amount due and owing by the borrower to the appellant.

[18] In cl 13.2 of the facility agreement, it was agreed between the appellant and the borrower as follows:

> Notwithstanding to the abovementioned provision, the Bank hereby agrees with the Borrower that in the event of the Borrower commit any event of default or defaults as stipulated in Clause 13.1 hereof within the facility Period, the Bank shall exhaust all available legal actions against the Borrower and other Security Party before exercising the Bank's right to utilise Fixed Deposit as provided by KPMNJ.

[19] The appellant conceded that there were still legal remedies which had yet to be taken against the borrower, the guarantor and other security parties. Based on this concession, His Lordship found that the appellant's act of uplifting the FD of the respondent was a clear violation of cl 4 of the MOD which amounted to a breach of contract.

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[20] Consequent to the above, His Lordship allowed the respondent's claim for the RM13m that the appellant had liquidated together with profit accrued thereon, and costs. The appellant's counterclaim was dismissed with costs. Hence this appeal.

THE APPEAL

[21] On the issue of validity of the MOD, learned counsel for the appellant submitted that the learned JC had erred in relying on the two authorities which were decided premised on the Co-Operative Societies Act 1948 when the statute applicable in the present appeal is the Co-Operative Societies Act 1993.

[22] It was submitted that the issue whether a co-operative society is permitted to provide security to a non-member for the benefit of another non-member is to be determined by reference to the Act and the co-operative Society's by laws. In support learned counsel submitted that vide s 53 of the Act, which provides that the transactions of a registered society with persons other than its members shall be subject to such prohibitions and restrictions as may be set out by its by laws, the Legislature has clearly made provisions that the Act and the by laws of a registered co-operative society shall be the basis for determining the validity of a transaction between a co-operative society and non-members.

[23] Learned counsel further submitted that by laws 4 and 5(g) of the respondent's by laws allow the respondent to enter into a transaction with a non-member. By law 4 of the respondent's by laws provides as follows:

> Tujuan Koperasi ini ialah untuk memajukan kepentingan sosio-ekonomi ahli-ahli menurut prinsip-prinsip Koperasi dengan menggalakkan penanaman modal untuk menjalankan perniagaan dan pelaburan yang boleh menguntungkan.

By law 5(g) provides as follows:

> Bagi mencapai tujuan tersebut Koperasi bolehlah, tertakluk kepada peruntukan-peruntukan Akta dan kaedah-kaedah, menjalankan sebarang kegiatan yang berikut:
>
> (g) membuat perjanjian dengan ahli-ahli dan bukan ahli dan mana-mana koperasi yang berdaftar dengan tujuan memberi kemudahan bagi perjalanan Koperasi ini.

[24] In respect of by law 5(g), learned counsel submitted that the respondent can enter into transactions with non-members for the purpose of providing facility for the operation of the co-operative society. It was submitted that the project was for the benefit of the respondent in furthering the economic interests of its members. The term loan facility was a necessity for the successful development of the project. It was a condition in the agreement between the

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respondent and the borrower that the respondent would provide the security deposit of RM25m. The appellant would not have granted the facility to the borrower without the respondent executing the MOD. Thus it was submitted that the MOD was a necessary transaction between the appellant and the respondent to secure the loan facility for the operation and furtherance of the respondent's object to promote the economic interests of its members. Therefore the MOD was valid and binding as between the appellant and the respondent.

[25] It was further submitted that whilst it is true that the by laws of a co-operative society bind only the said co-operative society and its members, the by laws serve as notice to non-members as to what are the scope of powers and limits of that co-operative society. Therefore the appellant has a right to rely on the respondent's by laws in asserting that the MOD was valid and enforceable under the Act.

[26] For the respondent, learned counsel referred to *Malaysia Shipyard* where at p 360, the Supreme Court said, inter alia, that a co-operative society being a statutory corporation is not allowed to do anything unless authorised by the statute under which it is incorporated. This principle was followed in the case of *Chase Manhattan Bank NA*, wherein Harun Hashim SCJ, in delivering the judgment of the Supreme Court said, inter alia, 'Whether the society had the power to give the pledge is governed by the Act'.

[27] It was submitted that s 53 has not widened the scope of s 52. On the contrary s 53 and by law 5(g) of the respondent's by laws must be read subject to ss 51–52.

[28] Learned counsel further submitted that the Legislature has, vide s 51(1) of the Act, expressly restricted the class of those who can receive loans from the respondent. Thus under s 51(1) a registered co-operative society, like the respondent, is prohibited from giving any Islamic financing or credit facility to persons other than those specified therein. In the present case, the MOD was given in favour of the appellant to secure the borrowing by the borrower. However both the appellant and the borrower are not members of the respondent and did not come within those category of persons specified in s 51(1). Therefore the MOD given was invalid for being given contrary to the Act.

[29] In respect of by law 5(g), learned counsel submits that by law 5(g) is vague and unclear in its meaning. Further the respondent's by laws cannot be the basis for determining the validity of the MOD and in support learned counsel relied on the judgment of Salleh Abas LP (as he then was) in the case of *Malaysia Shipyard* wherein His Lordship said, inter alia, that, 'the by law should

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not be the basis of determining the validity or otherwise of this guarantee since it is merely a rule of conduct which governs the internal government of the respondents.'

OUR DECISION

[30] We respectfully adopt the trite principle laid down by the Supreme Court in the case of *Malaysia Shipyard* that a statutory corporation can only do what is expressly authorised by the Act under which it is incorporated.

[31] The appellant contended that by virtue of s 51(2), the prohibition under s 51(1) does not apply to the respondent because the respondent is allowed by its by laws, in particular by law 5(g), to grant the MOD. With respect we are unable to agree.

[32] We agree with learned counsel for the respondent that the issue of the validity of the MOD must be determined by reference to the provisions in the Act and not by reference to the respondent's by laws since by laws are rules of conduct which govern the internal government of the respondent.

[33] Section 51 of the Act provides as follows:

Islamic financing or credit facility by co-operative society

51

(1) No co-operative society shall grant any Islamic financing or credit facility except to its members, its employees including the chief executive officer as provided in their schemes of service, its subsidiary as provided under subsection 19(2), or another co-operative society as may be approved by the Commission, and such Islamic financing or credit facility shall be subject to the directives or guidelines issued by the Commission and by laws of the co-operative society.

(2) Subsection (1) shall not apply to a co-operative society that is permitted to grant any Islamic financing or credit facility given —

(a) in the course of its business as provided in any other written law governing its operations; or

(b) in accordance with its by laws.

(3) The Commission may, by order, prohibit or restrict the lending of money on a charge or mortgage of immovable property by any co-operative society or class, category or description of co-operative society.

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[34] Section 51(1) expressly prohibits a co-operative society from granting any Islamic financing or giving credit facility except to the category of persons mentioned therein.

[35] Section 2 of the Act defines 'credit facility' as follows:

> 'credit facility' has the same meaning as defined in the Malaysia Co-operative Societies Commission Act 2007 [Act 665].

Act 665 defines 'credit facility' as follows:

> 'credit facility' means —
>
> (a) the giving of any advance, loan, trade credit or other facility in whatever form or by whatever name called whereby the person to whom the advance, loan, trade credit or other facility is given has access, directly or indirectly, to the funds or property of the person giving the same;
>
> (b) hire-purchase, leasing, factoring and such similar dealings or transactions;
>
> (c) the giving of a guarantee or the provision of any security in relation to the obligations of any person; or
>
> (d) any other like dealing or transaction as may be prescribed by the Commission;

[36] It is pertinent to note that the prohibition in s 51(1) is statutory in nature. However vide s 51(2), the Legislature has made provision where s 51(1) shall not apply to a co-operative society 'that is permitted' to grant any Islamic financing or credit facility given (a) in the course of its business as provided in any other written law governing its operations, or (b) in accordance with its by laws. We are of the view that learned counsel for the appellant has misconstrued s 51(2). In our considered opinion, on a proper construction of s 51(2), only a co-operative society which has been 'permitted' may grant Islamic financing or credit facility to persons other than those specified in s 51(1).

[37] A perusal of the Act shows that the Act has made provision vide s 87 for the Minister to give exemption to any co-operative society from any of the provisions of the Act. Section 87 states as follows:

> Exemption
>
> 87(1) The Minister may, on being satisfied that it is desirable to do so in the interest of the development of co-operative society generally or of a particular co-operative society or a particular class, category or description of co-operative society, by general or special order, subject to such conditions as he may impose, exempt any co-operative society or class, category or description of co-operative society, from any of the provisions of this Act, or direct that such provisions shall apply to any co-operative society or class, category or description of co-operative society, with effect from such date or with such modifications as may be specified in the order.

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(2) Any exemption made under subsection (1) shall be published in the *Gazette*.

[38] We have not been shown any evidence that the respondent has been given exemption from the provisions of s 51(1). In the circumstances we find that the respondent does not come within the class of co-operative society under s 51(2) that has been 'permitted' to grant any Islamic financing or give credit facility to persons other than those specified in s 51(1).

[39] The by laws of any statutory corporation can only provide for matters that are permissible under the Act and any by law which purports to allow what is prohibited by the Act, or are inconsistent with the provisions of the Act will, to that extent, be invalid for being ultra vires the Act. This is clearly provided by s 17A(1) of the Act which states as follows:

Application of by laws

17A(1) Any by laws of a co-operative society which are inconsistent with the provisions of this Act shall be void to the extent of its inconsistency.

Accordingly, no co-operative society can, by way of its by laws, confer upon itself any power to enter into any transaction that has been expressly prohibited by the principal Act. Any by law which purports to allow a co-operative society to do what is expressly prohibited by the Act would be invalid for being ultra vires the Act. Therefore we are unable to agree with learned counsel for the appellant that by law 5(g) allows the respondent to do what is prohibited by s 51(1). Further a perusal of by law 5(g) shows that it is general in nature. It is also subject to the Act and the regulations. Hence by law 5(g) must necessarily be read to apply only to those transactions that are permissible under the Act.

[40] With respect to s 53 of the Act, learned counsel for the appellant submitted that s 53 allows the respondent to issue the MOD. Learned counsel for the respondent on the other hand submitted that s 53 ought not to be interpreted as widening the scope of ss 51–52 but must be read subject to the said two provisions.

[41] Section 52 deals with the accepting of deposits and borrowing of funds from members and non-members. This provision is irrelevant to the issue at hand.

[42] Section 53 expressly provides that its application is subject to ss 51–52. Section 53(1) reads as follows:

Restriction on other transactions with non-members

53(1) Subject to sections 51 and 52, the transactions of a co-operative society with persons other than its members shall be subject to such prohibitions and restrictions as may be set out by its by laws.

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[43] The application of s 53 is clearly circumscribed by the provisions of ss 51–52. Therefore we find no basis for the appellant's submission that s 53 allows what is not permissible under ss 51–52.

[44] For the reasons stated above, we agree with learned counsel for the respondent that the MOD is invalid and unenforceable as it was issued in contravention of s 51(1) of the Act.

Breach of the contract

[45] Notwithstanding our finding above, for the purpose of completeness we will proceed to deal with the alternative submission by learned counsel for the respondent that, if the MOD was valid, the appellant had breached cl 4 of the MOD.

[46] Clause 4 of the MOD states as follows:

> 4 KPMJ hereby agrees that in the event the Borrower fails to repay the facility due and owing to the Bank together with interest or other cost incurred during the facility period and Provided Always that the Bank has exhausted all available legal actions or proceedings against the Borrower and other security party(s) to recover amount due and owing by the Borrower to the Bank, the Bank are at liberty to withdraw the said Deposit or such other sum(s) as may be from time to time substituted for or replacing the said Deposit and to apply the proceeds thereof in or towards the discharge of any amount due to the Bank.

[47] It is clear that under cl 4, the appellant was contractually obliged to exhaust all the legal remedies available to it to recover the amount due and owing by the borrower and other security parties before resorting to liquidating the FD. The appellant had conceded that it had not done so before liquidating the FD. In the circumstances, we find that the learned JC is correct in his finding that the appellant's act was premature and amounted to a breach of contract.

[48] For the reasons aforementioned, we dismissed the appeal and affirmed the decision of the High Court.

Appeal dismissed with costs.

Reported by Kanesh Sundrum